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Before the ~~DOCKET FILE COPY ORIGINAL~~
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	
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Second Periodic Review of the Commission's)	MB Dkt. No. 03-15
Rules and Policies Affecting the Conversion)	
to Digital Television)	
)	
Negotiated Channel Arrangement)	
Station KFTY(TV), Santa Rosa, CA)	File No. BSRECT-20051028ACZ
Station KRON-TV, San Francisco, CA)	File No. BSRECT-20051031AAW
Station KTFK-TV, Stockton, CA)	File No. BSRECT-20051031ADV
Station KTVU(TV), Oakland, CA)	File No. BSRECT-20051031ABN
Station KTNC-TV, Concord, CA)	File No. BSRECT-20051031ABG
Station KVIE(TV), Sacramento, CA)	File No. BSREET-20051020AAA
)	

To: The Secretary, FCC
Attn: Chief, Media Bureau

REPLY COMMENTS OF KVIE, INC.

KVIE, Inc. ("KVIE"), by its attorneys, hereby provides the following reply comments in the above-referenced proceeding. This pleading responds to the comments of Northern California Educational Television Association ("NCETA"), as filed on December 7, 2005 regarding the Commission's Public Notice, "Second Round DTV Channel Election Issues – Proposed Negotiated Channel Arrangements and Procedures for Filing Associated Pleadings," DA 05-3031, released November 23, 2005.

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Background

KVIE is the public television station in Sacramento, California, and has been providing public TV service to the area for more than forty (40) years. KVIE and five other area television station licensees in or near the heavily congested Bay Area TV market are parties to a Negotiated

Channel Arrangement (“NCA”) for the FCC’s DTV Channel Election Second Round. Under the NCA, the six (6) parties agreed among themselves on how best to allocate scarce available DTV channels left over from the First Round. Pursuant to the NCA, KVIE agreed to post-transition use of DTV Channel 9 in Sacramento, California, foregoing other available channels that other NCA parties selected. *See* KVIE’s FCC Form 384 Second Round Channel Election filing in FCC File No. BSREET-20051020AAA. Station KVIE(TV) currently operates on NTSC Channel 6, and was assigned out-of-core DTV paired Channel 53.

NCETA’s Comments state that KVIE’s use of DTV Channel 9 in Sacramento will cause 1.12% interference to its proposed operation of Station KIXE-TV, Redding, California, on DTV Channel 9.¹ (Given KIXE-TV’s service area population, the 1.12% interference amounts to only 4,047 persons.) In addition, NCETA notes that it had obtained a copy of the NCA, and that the parties themselves had agreed not to cause more than 0.1% interference to each other’s elected facilities. Therefore, it argues that KVIE should not be permitted to cause interference beyond 0.1% to KIXE-TV. NCETA concludes that KVIE could be allotted DTV Channel 6 for operations consistent with the FCC’s rules.

Argument

KVIE’s use of DTV Channel 9 in Sacramento, as negotiated among the parties to the NCA, represents the best possible option for KVIE to provide its post-transition noncommercial educational digital television service to the local community in manner that most efficiently utilizes the available broadcast spectrum. Moreover, as detailed below, it would frustrate the public interest to force KVIE to use DTV Channel 6 because the use of a low VHF band channel

¹ NCETA Comments at 2.

would prevent KVIE from providing the best possible digital service, while at the same time creating a preclusive effect on noncommercial educational FM station usage in the area.

The NCA Represents a Compromise Among Several Area Stations that Successfully Minimizes the Negative Impact on the Market As a Whole

The NCA represents a careful compromise among stations cooperating in or near a very crowded major TV market with scarce spectrum. As a result of its participation in the NCA, KVIE is materially assisting the Bay Area market in general, and the other parties in particular, by agreeing to a joint channel plan designed to minimize losses of relied upon service while utilizing the spectrum in the most efficient possible manner. In fact, as one would expect, KVIE has thoroughly researched DTV channel availability for its station, and has determined that DTV Channel 9 is the only option that comes close to replicating its NTSC Channel 6 coverage area. Moreover, had they not reached an agreement, KVIE and each of the other NCA parties would have had the right to compete with the other stations for the few still available DTV channels, thereby further complicating the FCC's channel election process.

In addition, as detailed in the engineering exhibit of Hammett & Edison, Inc. Consulting Engineers included with NCETA's Comments, the interference predicted to occur to KIXE's replication facilities as a result of KVIE-DT's operation on DTV Channel 9 in Sacramento affects only 4,047 people. Given the relative coverage areas and populations of KIXE's service contours in Redding, and that of the NCA parties further south, the amount of people affected by the predicted 1.12% interference to KIXE is equivalent to (or less than) 0.1% interference to the population figures for similar segments of the NCA parties' service areas.² Accordingly,

² According to Table I of Station Assignments and Service Information, December 21, 2004, DTV Channel Election Information and First Round Election Filing Deadline, *Public Notice*, DA 04-3922 (Dec. 21, 2004), KIXE-DT's DTV service contour included 360,722 persons, while
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NCETA is comparing apples to oranges by attempting to hold KVIE to the NCA's 0.1% interference provision (that the NCA parties applied specifically to their own stations) with respect to KIXE's much less populated service area.

On balance, this relatively small number (4,047) of potential viewers does not warrant forcing KVIE to accept an inferior low VHF Channel 6 for its permanent DTV operation (which would affect KVIE's entire 4,941,092 person service area).³ Moreover, service to 4,047 persons is not an adequate reason to forego additional noncommercial educational FM station opportunities for the area (as detailed below). In addition, as also discussed below, the FCC has already provided that the interference limits may be exceeded to accommodate in-core elections (up to 2.0%) in certain analogous circumstances. Prior to deciding on the 2.0% level, the Commission expressed its concern that such operations not cause "substantial interference to existing DTV service."⁴ The 4,047 persons at stake in this case can hardly be considered the "substantial interference" that the FCC was concerned about with regard to accommodating the DTV transition of stations with limited in-core choices.

Low VHF Channels Such As Channel 6 Represent Inferior DTV Options

Due to the unique and undesirable circumstances of low VHF channel licensees, the FCC has already afforded them special treatment in the DTV Channel Election Third Round by allowing them to seek alternate channel designations at that stage. In the *Second Periodic*

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KVIE-DT's included 4,941,092, with the population coverage of the other NCA parties as follows: KFTY-DT (636,887), KRON-DT (6,271,804), KTFK-DT (8,103,856), KTVU-DT (6,107,182), and KTNC-DT (7,206,846). Thus, 0.1% of the service areas of the NCA parties would affect up to 8,100 persons – twice as much as KIXE-TV's affected population at 1.12%.

³ *Id.* at 8, DTV population figures.

Review, the FCC specified that such licensees (or those subject to international coordination), will be allowed “to elect another channel for their final DTV operations,” noting that “[n]o other licensees with an elected (and ‘locked in’ channel) will be permitted to participate” in the third and final round of elections.⁵ The Commission explained that the special allowance was needed because low VHF channels may not offer the ability to provide the best DTV service to the public, and because the FCC had been persuaded that “low VHF licensees should be afforded an additional opportunity to find a channel that may better serve the public.”⁶ In particular, Channel 6 is a poor option for KVIE’s permanent DTV operation because its VHF low band channel operation is subject to greater levels of man-made noise, “skip” interferences, and interference from broadband over power line (“BPL”) signals.⁷

As a result, the FCC has determined that the low VHF band is so disadvantageous for DTV that stations stuck with such channels automatically qualify for the Third Round Channel Election, giving low VHF band stations two chances in the DTV channel election process. Moreover, such stations receive special priority in the upcoming Third Round. In its *Second Periodic Review*, the Commission noted that in consideration of “service to the public” and

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⁴ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18,279 (2004) (“Second Periodic Review”) at ¶ 56.

⁵ *Second Periodic Review*, 19 FCC Rcd 18,279 at ¶ 63.

⁶ *Id.* at footnote 129.

⁷ See, e.g., *Technical Standards for Determining Eligibility for Satellite-Delivered Network Signals Pursuant to the Satellite Home Viewer Improvement Act*, 22 CR 718, 15 FCC Rcd 24321 (Nov. 29, 2000) (at ¶ 50 regarding VHF and man-made noise); *Alternative Frequencies for Use by Public Safety Systems*, Report to Congress on Alternative Frequencies Available for use by Public Safety Systems (January 23, 2002) (at § II. B. regarding VHF and “skip”); *Amendment of Part 15 regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems*, 34 CR 470, FCC 04-245 (Oct. 28, 2004) (at ¶ 1850 regarding VHF and BPL).

“overall spectrum efficiency,” it will analyze factors such as “whether one or both of the station’s channels is/are in the low VHF band (which may weigh in favor of that station receiving priority).”⁸

KVIE’s plight is actually even worse than that of other stations to which the Commission has already afforded additional interference allowance in the Second Round of the DTV channel election process. In the *Second Periodic Review*, the Commission concluded that an interference conflict exists if a proposed facility would cause more than 0.1% interference, in addition to existing interference.⁹ However, the Commission also allowed licensees with out-of-core DTV channels to exceed that interference level to afford them an improved opportunity to select in-core NTSC channels.¹⁰ By *Public Notice* released August 2, 2005, the FCC provided additional guidelines for such circumstances, stating that “[i]n general, the staff intends to approve such in-core elections if they do not cause more than 2.0% additional interference to other stations (based on their DTV replication facilities not their maximized facilities).”¹¹

Thus, the FCC has already permitted stations with out-of-core DTV channels to utilize their otherwise viable in-core channels, despite causing up to 2.0% additional interference to existing stations. In this case, KVIE-DT has an out-of-core DTV assignment, and an otherwise *undesirable* “last resort” in-core option at low VHF band Channel 6. Accordingly, KVIE’s proposed election of vacant in-core DTV Channel 9 should be afforded at least the same additional interference allowance as those other single in-core stations were allowed. Under that

⁸ *Second Periodic Review*, 19 FCC Rcd 18,279 at ¶ 64.

⁹ *Second Periodic Review*, 19 FCC Rcd 18,279 at ¶ 56.

¹⁰ *Id.*

¹¹ DTV Channel Election: First Round Conflict Decision Extension and Guidelines for Interference Conflict Analysis, *Public Notice*, DA 05-2233 (Aug. 2, 2005).

2.0% standard, KVIE's election of DTV Channel 9 is satisfactory because, with the present proposal, KVIE only requires the acceptance of 1.12% interference.

Avoiding DTV Use of Channel 6 Also Eases FM Frequency Problems

Allowing KVIE to avoid permanent DTV use of Channel 6 would also serve the public interest by freeing up valuable opportunities for noncommercial educational FM station uses. As the Commission has explained, during the development of the initial DTV Table it sought to minimize "potential for interference between DTV and FM radio service by *avoiding the use of channel 6 for DTV wherever possible.*"¹² The Commission further "agreed[d] with [National Public Radio] that noncommercial radio licensees should not be solely responsible for resolving interference that might result" from DTV use of Channel 6, going so far as to require DTV licensees to protect against or eliminate harmful interference to any FM radio stations" in operation at the time of their DTV commencement.¹³ In fact, the Commission had recognized very early in the DTV transition planning process the unique problems associated with DTV use of low VHF channels, especially Channel 6, proposing from the start to "make DTV allotments to Channel 6 only where there is no other readily available allotment opportunity that would provide for adequate replication of an existing station's service area."¹⁴

¹² Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, 13 FCC Rcd 7418, FCC 98-24, MM Docket No. 87-268 (Feb. 23, 1998) at ¶ 46, emphasis added. The Order further noted that "[t]here is only one channel 6 allotment in the initial DTV Table." *Id.*

¹³ *Id.*

¹⁴ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10968, FCC 96-317, MM Docket No. 87-268 (Aug. 14, 1996) at ¶ 73-74.

Accordingly, KVIE's election of DTV Channel 9 pursuant to the NCA would eliminate the preclusive effect that its use of DTV Channel 6 would have on current and future noncommercial FM station use in and near the Sacramento community. Similarly, in another proceeding, the FCC amended its rules to substitute DTV Channel 10 for DTV Channel 6 at Juneau, Alaska, finding that the "public interest would be served by [the substitution] since it would permit station KTOO-DT to operate in the higher portion of the VHF band and avoid any potential future associated problems with Channel 6 and FM radiation interference."¹⁵ In fact, in this instance, California State University, Sacramento and Educational Media Foundation recently filed comments in support of the NCA on December 6, 2005 and December 7, 2005, respectively, explaining that the TV/DTV Channel 6 usage interferes with local FM operations in the noncommercial band, whereas KVIE's DTV Channel 9 election would be of considerable benefit to existing noncommercial educational FM broadcasters in the region.

Conclusion

For all of the above reasons, KVIE respectfully submits that the public interest would be best served by approval of the NCA, including KVIE's election of DTV Channel 9. The NCA represents the best possible solution for a congested area's overall DTV channel usage, and is the result of a joint agreement designed to forestall a continued competitive election process that the Commission would otherwise need to oversee. In addition, KVIE's use of DTV Channel 9 will preclude a bevy of problems associated with use of its current NTSC Channel 6, including low VHF band interference issues and the detrimental impact on noncommercial educational FM station allotments and operation. Indeed, the FCC has already recognized the plight of similarly

¹⁵ *Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Juneau, Alaska)*, 18 FCC Rcd 25073, DA 03-3853, MB Docket No. 03-97, RM-10683 (Dec. 5, 2003), *continued...*

situated out-of-core and low VHF licensees with respect to the DTV channel election process, and taken affirmative steps to accommodate their post-transition channel assignments.

Considering the minor amount of interference that KVIE-DT's operation on DTV Channel 9 is predicted to cause, approval of its channel election, and the entire NCA, offers the most efficient and reasonable solution in accordance with the Commission's stated policies.¹⁶

Respectfully submitted,

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December 14, 2005

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2003).

¹⁶ KVIE also notes that, unfortunately, NCETA's Comments made an unauthorized use of a portion of an engineering statement of Hammett & Edison, Inc. Consulting Engineers, as prepared for KVIE in connection with its negotiations with KIXE relating to an interference consent. While the Commission has stated that recourse against such an unauthorized use of work product lies in civil court action, it has also "expressed its disapproval of the unauthorized and uncompensated appropriation of another engineer's work product." *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132, 137 (D.C. Cir. 1984). See also *Gatlinburg Broadcast Communications, Inc. and Vacation Radio Co.*, 47 Fed. Reg. 43782 (Oct. 4, 1982) and *Roanoke Christian Broadcasting*, BC-32660, 47 R.R.2d 1067 (B/C Bur. 1980). In *WPOW, Inc.*, the District Court found that WPOW had a copyright in its engineering report, and that the defendant's unauthorized use of the report in its own FCC filing was a copyright violation supporting an injunction on its use.

CERTIFICATE OF SERVICE

I, Sue Fischer, hereby certify that copies of the foregoing Reply Comments of KVIE, Inc. were served this 14th day of December, 2005 by United States Express mail, postage prepaid, upon the following:

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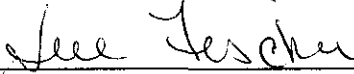
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